

Lessons of Prohibition for Contemporary Drug Policy

Introduction

In films, television, novels, and even in many scholarly historical narratives, Prohibition¹ is understood as a failed effort to “legislate morality” about personal conduct. According to this view, Prohibition demonstrates that the government cannot regulate personal conduct or individual moral choice. Prohibition supposedly shows that, when government goes too far, the normalization of crime and losing respect for law are the inevitable results.

This commonplace view of Prohibition is often held up as an object lesson that should inform contemporary policy about illegal drugs such as marijuana, heroin, or cocaine. Proponents of this libertarian analysis insist that government efforts to regulate drug use cannot be any more successful than government efforts to regulate alcohol use through the Eighteenth Amendment. These proponents insist that drug use cannot be regulated and that decriminalization or even outright legalization is the only sensible course.

Those who take this approach have learned some – but not all – of the historical lessons of Prohibition, and they often overlook the most important ones. This oversight owes something to the fact that historical accounts of Prohibition are often inaccurate, failing to view the event in context, both in terms of the events that succeeded and followed it. And this oversight also arises from the desire to impose facile conclusions on historical events.

When one casts aside a contemporary philosophical agenda and undertakes more nuanced view of the history of Prohibition, different lessons emerge which lead to different conclusions about how to manage contemporary drug policy. Contrary to the most widely held assumptions,

¹ For the purposes of this paper, “Prohibition” will refer to the period when the Eighteenth Amendment was in effect, 1920-33. By contrast “prohibition” will refer to the general concept of banning alcohol production and/or consumption.

an objective view of Prohibition shows it was effective in achieving many of its objectives, at least in the long run. Acknowledging Prohibition's successes, even if they are limited, permits a better analysis of how to make drug policy work.

Because of that analysis, the primary lesson of Prohibition is that it is possible to regulate personal conduct if the regulations focus on controlling how, when, and where that conduct takes place, not whether it takes place. Regarding illegal drugs, this lesson means that government policy should suspend its focus on controlling production, distribution, possession and use of drugs and, instead, make sure that drug users have every incentive to use drugs in a way that minimizes their dangerous effects on both personal health and social order.

History of Temperance Reform

The story of Prohibition begins with the social reform movements of the middle and late nineteenth centuries. A new conception of alcohol use and abuse developed through these movements with new ideas about the relationship between the individual and society. According to this new understanding, alcohol was an inherently dangerous substance whose use was a personal vice, and the moral depravity attendant with drinking had serious adverse effects on the social order. The proposed social policy of banning alcohol use, which culminated in Prohibition, depended on this understanding of alcohol use.

The Early Temperance Movement of the Mid-Nineteenth Century: Evangelical Moral Reform

Ministers in American churches had always warned about the moral, spiritual, and physical dangers of strong drink.² In this respect, temperance in using alcohol – or even total abstinence – was understood as a personal virtue of self-control, like chastity.³ According to this

² RONALD G. WALTERS, *AMERICAN REFORMERS 1815-1860* 124-28 (1978).

³ *Id.*

understanding of temperance, alcohol was not an inherently dangerous or unavoidably immoral substance; its use could follow a high standard of morality and personal propriety if the user had enough moral fiber to avoid its abuse.⁴

Changing social and economic circumstances beginning in the 1820s led to a change in the understanding of the virtue of temperance and the dangers of alcohol. With the beginnings of industrialization and urbanization, it became more important for workers to be timely, reliable – and sober.⁵ Expanding immigration and increasing differences in economic class made many Americans worry about social effect of the intemperate habits of their fellow citizens.⁶ Led by one of the United States’ most prominent churchmen, Lyman Beecher, ministers preached about alcohol abuse as a social problem and a defect of individual character.⁷ Their congregants responded by founding temperance societies, such as the American Temperance Union.⁸ These societies, like other social reform movements of the era, sought to solve social problems to assure social stability and preserving the moral order for democratic politics.⁹

Women often played leading roles in these temperance societies.¹⁰ At the outset of the movement, some men were uncertain about whether women should have a place in promoting temperance, and, if they should, what that role should be.¹¹ But these doubts were soon overcome. Women moved to the forefront of the movement because, with temperance as with other social reform movements, protecting society from moral evils was increasingly understood as a crucial part of women’s unique social role.¹² In their capacity as wives and mothers, women

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ WALTERS, *supra* note 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 126-28.

¹¹ *Id.*

¹² *Id.*

were seen as the primary guardians of the moral order, beginning in the home with their husbands and children.¹³

Temperance reformers, particularly women, were especially concerned with what some have called “saloon culture.”¹⁴ According to temperance reformers, the most morally dangerous kind of drinking took place in saloons and taverns, which were portrayed as dens of iniquity where the rending of the nation’s moral fabric began.¹⁵ A wide variety of vices began at the saloon and spread outward to infect the rest of society, and women temperance reformers strove to keep their husbands, brothers, and sons out of the saloon.¹⁶

The temperance reform movement grew quickly. In 1829 there were about 1,000 societies with about 100,000 members. By 1834 5,000 local societies claimed membership totaling 11,000,000.¹⁷ In these early temperance groups, the emphasis was on curbing the drinking habits of others, especially the lower classes and immigrants. This phase of the temperance movement was as much about social control as character building.¹⁸

A meeting of six friends in Baltimore in 1840 began the transformation of the temperance movement. These men, who considered themselves “drunkards,” wanted to help each other maintain a pledge of total abstinence.¹⁹ This group was not about preaching to others and distributing pamphlets about the dangers of strong drink; the society’s objective was to encourage members to take a pledge for total abstinence from alcohol in any form and to

¹³ *Id.*

¹⁴ BERNARD BAILYN, ET AL., *THE GREAT REPUBLIC: A HISTORY OF THE AMERICAN PEOPLE* 330-37, (3rd ed.) (1985).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Milton A. Maxwell, *The Washingtonian Movement*, 11 *QUARTERLY J. STUDIES ON ALCOHOL* 410, 411 (1950).

¹⁸ WALTERS, *supra* note 2.

¹⁹ Maxwell, *supra* note 17.

regularly attend meetings to provide mutual support for maintaining their pledge.²⁰ Calling their group the “Washington Temperance Society,” they quickly gained new members in Baltimore, and the movement continued to spread across the country as new chapters opened everywhere.²¹ A parallel group named after Martha Washington was formed for women.²² Other groups similar to the Washingtonians were founded across the country.²³

There were two distinct, compatible dimensions of the temperance movement in the United States in the early and middle nineteenth century. The first was an effort at social control. Temperance reformers saw a variety of social and moral ills emerge from alcohol use and abuse, and they cautioned their fellow citizens to avoid alcohol to stay off the slippery moral slope that could lead them – and society – to perdition. The second dimension was an effort to build fellowship among individuals striving to control a self-destructive behavior. A central element of this fellowship was that any use of alcohol was dangerous and that the only way to avoid self-destruction was to avoid alcohol entirely.

By the 1840s, all of this social ferment led to political action as the first anti-alcohol laws were passed. These state statutes were the harbingers of the movement that would lead to Prohibition in the early twentieth century. In 1838, Massachusetts enacted a statute prohibiting the sale of distilled spirits in amounts of less than fifteen gallons.²⁴ This law prevented hard liquor use by the lower classes, who could not afford to purchase whiskey or rum in such large quantities.²⁵ Even more extensive regulation was imposed in Maine. Led by several temperance groups, including the Washingtonians, the city of Portland, Maine banned the sale of intoxicating

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 427.

²³ WALTERS, *supra* note 2. at 130-34.

²⁴ WALTERS, *supra* note 2. at 135-36.

²⁵ *Id.* at 135-36.

liquor entirely in 1842.²⁶ Nine years later, when Portland's mayor became governor, a state legislature enacted a statute replicating that ban statewide.²⁷

The so-called "Maine Law" of 1851 became a model for temperance reformers across the country.²⁸ By 1855, every New England state had passed its own version of the Maine Law, and every state from Ohio to Iowa was dry.²⁹ But that was as far as alcohol prohibition got during the first wave of the temperance movement. Efforts to bring the Maine Law to other states failed, and by 1868, the Maine Law was only still in effect in Maine.³⁰

During the first phase of the temperance movement, the predominant strategy for changing society's use of alcohol involved two principal aspects. First, through legislation like the Maine Law, it sought to impose indirect regulation on drinking by the lower classes, which reformers believed was the greatest single source of abusive drinking. Second, it sought to encourage individual moral uplift through promoting the pledge of total abstinence, especially among the middle and upper classes. In both these aspects, the movement reflected that curbing alcohol abuse meant affecting the behavior of individual drinkers, both in a legal and moral dimension.

Later Nineteenth-Century Temperance Movements: Moral Reform Through Political Action

After a period of relative quiescence around the Civil War, the temperance crusade revived in the latter part of the nineteenth century, driven by many of the same motives that had characterized the mid-century phase of the movement – exercising social control over economic or ethnic groups thought to be dangerous and seeking to use the law and moral suasion to

²⁶ *Id.* at 136.

²⁷ *Id.* at 136-37.

²⁸ RUSSELL BLAINE NYE, *SOCIETY & CULTURE IN AMERICA, 1830-1860*, 51 (1974)

²⁹ *Id.*

³⁰ *Id.*

regulate individual drinking. There was an important difference with the second phase of nineteenth-century temperance movements, however. Unlike their predecessors that worked primarily through church organizations and undertook a program of moral education, these later groups focused on political action and legal reform. These groups were not merely interested in convincing their fellow citizens to take a pledge of abstinence; they would compel them as a matter of law and sought to use every aspect of the political system to achieve that end. In addition, these political efforts at legal reform were less focused on regulating individual consumption in the saloon than on controlling the production and distribution of alcoholic beverages at the brewery and distillery.

At the forefront of the renewal of the movement was the Women's Christian Temperance Union ("WCTU"). Formed in 1874, the WCTU believed that all social problems were interconnected and that "the use of alcohol and other drugs was a symptom of the larger problems in society."³¹ By the 1890s, temperance was still at the core of the organization's mission, but the majority of its internal subdivisions dealt with non-temperance issues, and achieving women's suffrage was one of its most important non-temperance goals.³² To accomplish these ends, the WCTU was one of the first organizations to have a full-time lobbyist in Washington advocating for its political objectives.

Another more explicitly political approach to reforming alcohol use came from the Anti-Saloon League ("ASL"). By the first decade of the twentieth century, the ASL was the most powerful organization advocating for restrictions on alcohol, and it achieved this power and

³¹ Women's Christian Temperance Union, "Early History" (accessed at <http://www.wctu.org/earlyhistory.html>) (November 2, 2014)

³² Women's Christian Temperance Union, *supra* note .

influence by focusing exclusively on political action.³³ In many respects, the ASL operated like a modern lobbying firm. It employed organizers to raise funds, mobilize members to vote, and, above all to collect political favors from candidates and office holders, who would propose and support model legislation drafted by ASL lawyers.³⁴ Unlike the WCTU or earlier temperance organizations, the ASL did not strive to promote individual moral improvement – or even individual abstinence. “The ASL was so focused on Prohibition that it did not even require its members to promise to abstain from alcohol.”³⁵

Americans’ drinking habits around the turn of the century changed in ways that buttressed the arguments of groups like the WCTU and ASL. Alcohol consumption shot up in the first decade of the twentieth century. Beer production increased from 1.2 billion to 2 billion gallons.³⁶ Distilled spirit production also grew significantly, 97 million to 147 million gallons.³⁷ Measured on a per-capita basis, alcohol consumption increased by nearly 33 percent between 1900 and 1913,³⁸ to 2.6 gallons, the highest level since the Civil War.³⁹ The death rate from liver cirrhosis (15 per 100,000) and chronic alcoholism (10 per 100,000) escalated to high levels.⁴⁰

As Americans drank more heavily and increasingly suffered from the adverse health consequences of their habit, temperance became a larger point of focus of public policy debates. And, in these debates, the rhetoric of anti-alcohol arguments was changing; more and more

³³ Harry G. Levine & Craig Reinerman, *Alcohol Prohibition & Drug Prohibition: Lessons from Alcohol Policy for Drug Policy* in *DRUGS & SOCIETY: U.S. PUBLIC POLICY* 44 (Jefferson M. Fish, ed.) (2006)

³⁴ *Id.* at 44.

³⁵ Jack S. Blocker, Jr., *Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation*, 96 *AM J. PUB. HEALTH* 233, 234 (2006)

³⁶ *Id.* at 236.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*; see also Angela K. Dills & Jeffrey A. Miron, *Alcohol Prohibition and Cirrhosis*, 6 *AM. L. & ECON. REV.* 285 (2004).

often, secular reasons, rather than religious and moral ones, were employed to convince politicians and voters that restricting or eliminating alcohol use was important to the public good. The growing scientific study of public health contributed arguments against alcohol use that focused on its social effects rather than on how alcohol could harm an individual's moral or physical condition.⁴¹ Around the turn of the century, the publication of physiological and epidemiological studies classified alcohol as a depressant made a scientifically plausible argument that its use was associated with crime, mental illness, and disease. The American Medical Association went on record in opposition to the use of alcohol for either beverage or therapeutic purposes.⁴²

These scientific arguments were, to a great extent, re-formulations of arguments that religious advocates had been making for three-quarters of a century. But when framed in science, they took on a newly persuasive force, especially because they could not be refuted on sectarian grounds. A Catholic might dismiss an argument against drinking made by a Protestant temperance organization; but it was much harder for anyone to dismiss an argument advanced on the supposedly objective foundation of scientific analysis. Opponents of alcohol use aggressively pursued opportunities to make the scientific case against drinking. By 1901, school curricula in every state included "Scientific Temperance Instruction," and half of the school districts in the United States used a textbook that described alcohol as a poison that would invariably lead to addiction.⁴³

⁴¹ Harry Gene Levine, *The Discovery of Addiction: Changing Conceptions of Habitual Drunkenness in America*, 39 J. STUDIES ON ALCOHOL 161, 161-62 (1978).

⁴² Blocker, *supra* note 35 at 235.

⁴³ *Id.* see also Catherine Gilbert Murdock, DOMESTICATING DRINK: WOMEN, MEN, AND ALCOHOL IN AMERICA, 1870–1940 (1998) and Elaine Frantz Parsons, MANHOOD LOST: FALLEN DRUNKARDS AND REDEEMING WOMEN IN THE 19TH-CENTURY UNITED STATES (2003).

Despite the change in rhetoric and tactics, one important thing about the temperance movement stayed the same: it was still largely concerned with controlling the drinking of other people. When states passed laws regulating alcohol production, distribution, and use around the turn of the twentieth century, the structure of these laws reflected this orientation. As one scholar has pointed out:

Self-control lay at the heart of the middle-class self-image, and middle-class prohibitionists simply acted on the prejudices of their class when they voted to close saloons while allowing drinking to continue in settings they considered to be respectable. Some state prohibition laws catered to such sentiments when they prohibited the manufacture and sale of alcoholic beverages, but allowed importation and consumption.⁴⁴

For all of the changes in the movement's rhetoric and tactics, many crucial characteristics of the movement persisted as the nineteenth century turned to the twentieth. Above all, the temperance/prohibition movement strove to convince their fellow citizens they should not drink or to prevent them from making that choice. But there was never any serious suggestion that the best approach to curbing alcohol abuse might be to encourage moderation rather than require abstinence.

The Culmination of the Movement: Passage of the Eighteenth Amendment

As the prohibitionist movement increased its efforts and effectiveness, and as groups like the ASL and WCTU increasingly focused on political action at the legislative level, brewers, distillers, and others in the alcohol industry fought back on the political front.⁴⁵ Political momentum towards more restrictive alcohol regulation continued. Adopting a more explicitly political strategy was a new direction for the anti-alcohol movement, but it made sense in several

⁴⁴ Blocker, *supra* note 35 at 235.

⁴⁵ *Id.* at 236.

considerations about the new organizations advocating for prohibition and the political and cultural and climate in which they were operating.

One important change in the movement was an increased focus on political action to increase the regulation of the supply of alcohol, as opposed to earlier strategies that sought to marshal moral forces to discourage demand. If the movement could not restrict the willingness of some Americans to drink, it could restrict their ability to exercise that choice. Political reform efforts aimed at controlling the production and distribution of alcoholic beverages.

This change was clear in the actions of the ASL. The ASL's strength was its ability to influence legislators at both the state and national level.⁴⁶ It was easier for the ASL to authorize a constitutional amendment in Congress and ratified in state legislatures than it would have been for the ASL to accomplish alcohol regulation on a state-wide basis through the referendum process.⁴⁷

The ASL's political strategy was not a product of its organizational dynamics; it reflected a new approach to the efforts to stop alcohol use that reflected the political realities of the time. Because of the scientific revolution ushered in by the acceptance of the theory of evolution, there was an increasing acceptance that social circumstances shaped individual behavior as much as choice. In light of this idea, it made sense for those concerned with the abuse of alcohol to control the social and economic structure in which alcohol was consumed. "[T]he temperance and prohibition movements can . . . be understood as part of a larger public health and welfare movement active at that time that viewed environmental interventions as an important means of promoting the public health and safety."⁴⁸

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Robert G. LaForge, *Misplaced Priorities: A History of Federal Alcohol Regulation and Public Health Policy* [PhD dissertation] (Baltimore: Johns Hopkins University, 1987).

Prohibition also had political appeal as a response to the widespread political upheaval of the early twentieth century. As one historian has noted, “a growing socialist movement and bitter struggles between capitalists and workers . . . made prohibition seem less radical by contrast.”⁴⁹ When many activists were prescribing socialism, anarchism, or other radical changes as a cure for the myriad social and economic problems that accompanied the full-fledged development of industrial capitalism, prohibition seemed to offer a remedy that might avoid a dramatic restructuring of the political and social order.

The ASL won a significant legislative victory in 1913, when Congress enacted the Webb–Kenyon Act, which prohibited the interstate transportation of any form of alcohol into a state where that form of alcohol was illegal.⁵⁰ This legislation was a substantial limitation on the national distribution network for alcohol products. It was a significant first step towards a national prohibition of alcohol distribution.

As it was winning its victory with the Webb-Kenyon Act, the ASL launched a campaign for a constitutional amendment to prohibit alcohol.⁵¹ Here again, focusing its efforts on an amendment to the federal constitution made sense for the ASL in terms of its organizational abilities and objectives.

That effort resulted in a landmark achievement in August 1917, a few months after the United States entered the war, when the Senate approved a resolution setting forth the language of what would become the Eighteenth Amendment. The proposed amendment prohibited “the manufacture, sale, or transportation of intoxicating liquors” within the United States, and the import or export of intoxicating liquors to or from the United States.⁵² The proposed amendment

⁴⁹ Blocker, *supra* note 35 at 236.

⁵⁰ See 27 U.S.C. § 122 (accessed at <http://www.law.cornell.edu/uscode/text/27/122>) (November 2, 2014).

⁵¹ Blocker, *supra* note 35 at 236.

⁵² U.S. Const., Amend. XVIII.

said nothing about prohibiting the consumption of alcohol. By regulating the manufacture and sale of alcohol as opposed to consumption, the proposed amendment could be seen as an extension of the Webb-Kenyon Act. The House of Representatives approved a resolution regarding the same proposed language in December 1917, and the amendment was submitted to state legislatures for ratification. According to its terms, the proposed amendment had seven years to win ratification.

The outbreak of World War I and the beginning of United States involvement in 1917 created new political opportunities for prohibitionists, which would introduce prohibition before the ratification of the Eighteenth Amendment. A first crucial step came from passing the Lever Act of 1917, also known as the Food and Fuel Control Act.⁵³ The Lever Act created two federal agencies, the Food Administration and the Fuel Administration, which had the power and responsibility to control domestic consumption and production of food and fuel to assure adequate military supplies of both during the duration of the war.⁵⁴ One element of the statute prohibited the production of any “distilled spirits” from any produce that could be used for food.⁵⁵ The rationale for this restriction was to preserve food products for war needs; but there can be little doubt it was also a gesture towards prohibitionists and the victory associated with Congressional approval of the language for the Eighteenth Amendment.

Wartime regulation did not stop at distilled spirits. By a pair of executive orders issued in January and September 1918, President Wilson extended the restrictions on alcohol production by banning the production of any “malt liquors” with an alcohol content of over 2.75 percent by weight.⁵⁶ This ban was followed the Wartime Prohibition Act, which prohibited the

⁵³ Pub. L. 65-41, 40 Stat. 276.

⁵⁴ See Pub. L. 65-41, 40 Stat. 276.

⁵⁵ Pub. L. 65-41, 40 Stat. 276.

⁵⁶ See *Ruppert v. Caffey*, 251 U.S. 264 (1920) (discussing the history of wartime restrictions on alcohol production).

sale of any alcoholic beverages having an alcohol content of over 2.75 percent by weight.⁵⁷

Despite its name, the Wartime Production Act did not pass Congress until November 18, 1918, a week after the armistice ending the fighting in World War I; and it did not take effect until July 1, 1919, three days after signing the Treaty of Versailles, which formally ended the war.

Wartime regulations continued in effect while the prohibition amendment was making its way through the ratification process. That process did not take long; ratification was complete by January 1919, so the effective date of the Eighteenth Amendment would be in January 1920. In October 1919, Congress passed the Volstead Act,⁵⁸ which was the enabling legislation for the Eighteenth Amendment. President Wilson vetoed the Volstead Act, but Congress overrode the veto.

Like the amendment, the Volstead Act included no provision concerning the consumption of alcohol; it only forbade the manufacture, transportation, sale, importation, and exportation of “intoxicating” beverages. In addition, it supplied a definition of the term “intoxicating liquors” in the amendment language as any beverage containing over 0.5 percent alcohol by volume. The Volstead Act included a significant exemption, permitting the possession of alcohol in one’s home for the sole use of the owner, his or her family, and guests. Sacramental wine and medicinal liquor exempt from the ban.⁵⁹ Between the Eighteenth Amendment and the Volstead Act, the United States was dry as of January 17, 1920.

Benefits of Prohibition

According to the predominant narrative in popular culture, Prohibition was a failure. In this view, Americans’ refusal to stop drinking, even from the moment that the Eighteenth

⁵⁷ 40 Stat. 1045, c. 212.

⁵⁸ P.L. 66-66, 41 Stat. 305-23.

⁵⁹ Blocker, *supra* note 35 at 236.

Amendment and the Volstead Act took effect, meant that Americans rejected the moral arguments for banning alcoholic beverages and that the enforcement of Prohibition over the next thirteen years was an exercise in futility. Prohibition did not fulfill the highest aspirations of its advocates. But that does not mean it was an abject, total failure.

Indeed, Prohibition succeeded in an important respect; it resulted in a decline in alcohol consumption that persisted long after repeal. After 1933, annual per capita annual consumption in the United States was 1.2 gallons, less than half the rate of the period between 1900 and 1913.⁶⁰ Although annual consumption rose to about 2 gallons per capita in the 1950s and 2.4 gallons in the 1960s, it did not return to pre-Prohibition levels until the early 1970s.⁶¹ Total abstinence also increased. In a poll taken in 1939, 42 percent of respondents claimed that they never drank. By 1960, the abstinence rate fell only slightly to 38 percent.⁶²

As consumption declined, so did the public health problems associated with alcohol abuse. Death rates from cirrhosis and alcoholism, hospital admissions for alcoholic psychosis hospital admissions, and arrests for drunkenness all fell sharply during the few years immediately preceding 1920 and in the first years of Prohibition.⁶³ And as with consumption, they rose gradually after that but never again reached the high levels recorded during the period between 1900 and 1915.⁶⁴

⁶⁰ Jeffrey A. Miron & Jeffrey Zwiebel, *Alcohol Consumption During Prohibition*, 81 AM. ECON. REV. 242–247 (1991); Dills and Miron, *supra* note 40; John C. Burnham, *New Perspectives on the Prohibition ‘Experiment’ of the 1920s*, 2 J. OF SOCIAL HISTORY 51–68 (1968); *see also* Blocker, *supra* note 35 at 237.

⁶¹ Blocker, *supra* note 35 at 237.

⁶² *Id.*; *see also* Michael E. Hilton, Trends in US Drinking Patterns: Further Evidence From the Past 20 Years, 83 BRITISH JOURNAL OF ADDICTION 269–278 (1988); KLAUS MÄKELÄ, ET AL., A COMPARATIVE STUDY OF ALCOHOL CONTROL, vol 1 of ALCOHOL, SOCIETY, AND THE STATE 21–24 (1981).

⁶³ Blocker, *supra* note 35 at 237.

⁶⁴ Dills and Miron, *supra* note 40; *see also* Blocker, *supra* note 35 at 237

The experience of other countries in the early twentieth century raises questions about whether Prohibition's total ban on alcohol was necessary to achieve these reductions in overall consumption and in the rates of alcohol-related illnesses. During the years when the United States was struggling to make Prohibition work, Great Britain and Australia both enacted legal regimes that heavily regulated alcohol but that did not ban production or consumption.⁶⁵ Because of these policies, total alcohol consumption declined in both countries, as did the incidence of alcohol psychosis and mortality from liver cirrhosis.⁶⁶ Great Britain and Australia achieved the same outcome as the United States but without the large government expenditures for enforcement or the shift of wealth to criminal enterprises.⁶⁷ Because these regulatory systems included aggressive taxes on alcohol, government revenues increased with implementing a policy aiming at controlling alcohol use, not banning it.⁶⁸

There is no denying that regulating alcohol use had beneficial outcomes for both public and individual health. The long-term decline in the consumption of alcohol and in the incidence of alcohol related disease and illness demonstrates that regulation can work. The real question is not whether regulation can be effective but, rather, what kind of regulation is most effective.

Problems with Prohibition

Prohibition had bad outcomes and good ones. Many of the detrimental effects of Prohibition involved subtle changes in cultural patterns and practices and are difficult to see at first glance. The two leading problems with prohibition were its effect on attitudes about the law and the damage it caused to important sectors of the economy.

⁶⁵ Levine & Reinerman, *supra* note 33 at 50.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

The source of some of the most fundamental, albeit subtle, problems with Prohibition was that it turned out to impose far greater restrictions on personal conduct and to have far broader consequences than most people anticipated when the Eighteenth Amendment was ratified.⁶⁹ The broad scope of Prohibition resulted from the fact that the Eighteenth Amendment itself had not precisely defined what kind of alcohol would be prohibited. Many had assumed that the Eighteenth Amendment would only apply to distilled liquor, and, perhaps, to the most potent forms of beer and wine, leaving most kinds of beer and wine outside Prohibition. But when the Volstead Act provided for a broad definition of “intoxicating liquor,” it became apparent that Prohibition would sweep far more broadly than most anticipated.⁷⁰

The broad scope of the Eighteenth Amendment and the Volstead Act created a disjunction between the rationale for Prohibition and its reality. To a great extent, the public health and personality morality arguments for Prohibition had attributed the problems with alcohol to those who abused it, not to those who drank in moderation.⁷¹ To a great extent, many of those who favored Prohibition were moderate drinkers who wanted to support a law that would curb abuse and the social ills created by such abuse.⁷² In this respect, many Americans expected Prohibition to be something that would control other people’s conduct, not their own.⁷³ When Prohibition made it illegal to have a cold beer or two after work or to have a single glass of wine with dinner, many thought the law went too far.⁷⁴

Once there was a disjunction between the rationale for Prohibition and its practical effects, the law commanded less respect. If individuals could not square the reality of

⁶⁹ Blocker, *supra* note 35 at 237.

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *See id.*

⁷³ *See id.*

⁷⁴ *See* Blocker, *supra* note 35 at 237.

Prohibition with their expectations and their moral principles, they could feel freer to violate the law, at least around the edges. The ratification of the Eighteenth Amendment may have reflected a national moral consensus against alcohol abuse, but it reflected no national moral consensus against patterns of alcohol consumption that had gained wide cultural acceptance across generations. For this reason so many felt free to violate the Volstead Act with a clear conscience.

Technical legal problems with enforcing Prohibition only exacerbated public skepticism about the law. The obvious enforcement problem is that few wanted to obey the law. But, besides that problem, there was never an effective enforcement mechanism for Prohibition. The second clause of the Eighteenth Amendment provided that the states and the federal government had “concurrent power” to enforce the law.⁷⁵ Proponents of the amendment, especially the ASL, anticipated that state governments would assume the primary burden of enforcement.⁷⁶ There was little impetus to create an enforcement mechanism on the federal level.⁷⁷ But states were reluctant to take up the politically unpopular job of enforcement, and, when they did, the statutes authorizing enforcement action or funding could be repealed with relative ease by Prohibition opponents.⁷⁸

These enforcement problems contributed to a disrespect for the law, but not in the way most commonly supposed. In many popular historical accounts, Prohibition is understood as having created a breeding ground for organized crime.⁷⁹ Prohibition prompted substantial

⁷⁵ U.S. Const., Amend. XVIII, cl. 2.

⁷⁶ Richard F. Hamm, *SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880–1920*, 266–69 (1995).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Levine & Reinerman, *supra* note 33 at 50-51.

criminal activity centered on smuggling and bootlegging.⁸⁰ But, except for Chicago and a few other localized exceptions, the principal violators of the Volstead Act and the Eighteenth Amendment were small distillers or wine-makers, including those who made “bathtub gin” or homemade wine strictly for their own consumption, not for widespread sale to the public.⁸¹ In the national context, organized criminal gangs made up a relatively small, albeit highly publicized, part of the crime problem associated with Prohibition.⁸² Because the law never prohibited consumption, and because so many Americans continued to drink throughout Prohibition, there was a powerful impulse promoting the violation of the law – and everyone knew it. With such widespread disregard for a particular law, the law lost a good deal of its authoritativeness. After Prohibition, it would always be easier to tolerate unlawful conduct and for citizens to assert their own morality over and above the law.

Prohibition also hurt the economy. When the nation’s economy was growing dramatically and when national economic growth was increasingly understood as the foundation for social mobility and political equality, Prohibition destroyed an entire sector of the economy that generated substantial income for hundreds of companies and thousands of individual employees. In 1916, before wartime restrictions, 1,300 breweries produced regular beer in the United States; after Prohibition, there were none.⁸³ During the same period, the number of distilleries was cut by 85%, and most of the survivors produced alcohol only for industrial purposes.⁸⁴ Demand for agricultural products dropped because of Prohibition. Although “near beer” was legal, it required 10 percent as much, 8 percent as much the rice and hops, and a little

⁸⁰ Blocker, *supra* note 35 at 237; *see also* Andrew Sinclair, PROHIBITION: THE ERA OF EXCESS 211–212, 220–230 (1962),

⁸¹ Levine & Reinerman, *supra* note 33 at 51-52.

⁸² *Id.*

⁸³ *Statistical Abstract of the United States: 1928* (Washington, DC: US Bureau of the Census, 1928), 767

⁸⁴ *Id.*

over 3 percent of the corn used to make full-strength beer before Prohibition.⁸⁵ Where the United States had 318 wineries in 1914, it had 27 of 1925.⁸⁶ The number of liquor wholesalers diminished by 96 percent, and the number of legal retailers by 90 percent.⁸⁷ From 1919 to 1929, federal tax revenues from distilled spirits dropped from \$365 million to less than \$13 million, and revenue from fermented liquors from \$117 million to virtually nothing.⁸⁸

Prohibition also indirectly damaged another important sector of the economy: merchant shipping. The bans on liquor importation and exportation crippled American ocean liners in the competition for transatlantic passenger service.⁸⁹ This contributed to the ongoing decline of the United States merchant marine, plus creating an irritant in diplomatic relations with Great Britain and Canada.⁹⁰

When carefully examined, the problems associated with Prohibition lead to the same conclusion as an examination of its benefits. When Prohibition fell short, it was it swept too broadly and because there was a disjunction between its professed objectives and its actual effects. These shortcomings support the conclusion that Prohibition attempted to regulate the wrong thing in the wrong way, not that any attempt at regulation of personal conduct is doomed to failure.

Regulation and Post-Prohibition Changes in the Culture of Alcohol Use

Prohibition changed the way Americans consumed alcohol, even if some of the changes were only temporary because they were driven by the surreptitious nature of consumption during

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Statistics Concerning Intoxicating Liquors* (Washington, DC: Bureau of Industrial Alcohol, US Treasury Department, 1930), 3, 60, 64, 72

⁸⁸ *Id.*

⁸⁹ Blocker, *supra* note 35 at 237.

⁹⁰ Blocker, *supra* note _ at 237.

Prohibition. After 1919, the consumption of distilled spirits increased as a percentage of all alcohol consumed, reversing a decline that had continued for over seventy years.⁹¹ Beer consumption had a corresponding decline because it was more difficult to make, store, and ship secretly and was less profitable for illegal brewers or distributors.⁹² Wine consumption also increased through a legal loophole.⁹³ The Volstead Act failed to ban the production and sale of grape concentrate, which could be rehydrated and fermented to make wine.⁹⁴ The growing of wine grapes boomed, especially in California, and grape concentrate was shipped around the country where many Americans made wine at home for personal use or small-scale, local distribution.⁹⁵ Many recent immigrants from countries with a wine-making tradition succeeded in this enterprise.⁹⁶

Prohibition also resulted in a change in how Americans understood alcoholism. Once alcohol was officially banned, the existing structure of inebriety asylums and self-help groups dissolved on the presumption that the legal ban on alcohol consumption would bring about the end of widespread alcohol abuse.⁹⁷ But when Americans disregarded the ban on consumption and when alcohol abuse persisted, new organizations to help abusers emerged.⁹⁸ Foremost among these was Alcoholics Anonymous (“AA”), which introduced a new approach to understanding and reasons for alcohol abuse, and a new approach to helping alcohol abusers end a cycle of self-destructive behavior.⁹⁹

⁹¹ Levine & Reinerman, *supra* note 33 at 51-52; Blocker, *supra* note 35 at 237.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Levine & Reinerman, *supra* note 33 at 51-52.

⁹⁷ Blocker, *supra* note 35 at 238.

⁹⁸ *Id.*

⁹⁹ *Id.*

AA's approach to helping alcoholics rejected an idea that had long been central to the crusade against alcohol use – that alcohol was inevitably and unavoidably addictive and that anyone who drank it would soon be forever enslaved to it.¹⁰⁰ Instead, AA adopted that alcoholism was a disease, distinguishing between normal drinkers, who were capable of moderation, and compulsive drinkers, who were not.¹⁰¹ As AA became more successful and its ideas more widely accepted, the disease concept of alcoholism opened the door to drinking by everyone else.¹⁰²

Prohibition effected a change in the way alcohol was regulated. After Prohibition, alcohol use changed from being “a scandal, crisis and constant front-page news story to something routine and manageable.”¹⁰³ This was because, for all of its faults, Prohibition brought about a change in how government regulated alcohol use.¹⁰⁴ And this change involved creating a system of limitations and incentives that made it easier and more socially acceptable to use alcohol moderately in the home -- the alcohol use that centuries of cultural experience suggested was the safest and least problematic way to use alcohol.

The main obstacle to repeal was the problem of how to institute an effective system of government regulation of alcohol production and use. This problem seemed even more formidable after the experience of Prohibition demonstrated how well a highly decentralized, underground alcohol industry could work, despite serious efforts at government regulation.¹⁰⁵ Some advocates of repeal argued that the only way to legalize alcohol was to give the

¹⁰⁰ Kurtz Ernest, *Not-God: A History of Alcoholics Anonymous* (rev ed) (1991); Blocker, *supra* note 35 at 238.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Levine & Reinerman, *supra* note 33 at 59.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

government a monopoly on its production and consumption.¹⁰⁶ Ironically enough, one of these advocates was John D. Rockefeller, Jr., one of the last people one might expect to favor a government-owned monopoly.¹⁰⁷

The post-Prohibition system of regulation was essentially similar in every state. The right to sell alcohol was subject to licenses issued by a commission that operated as an agency of state government.¹⁰⁸ There were different licenses for beer and wine, on the one hand, and distilled spirits, on the other; and, for issuing licenses authorizing on-premises consumption, state commissions favored establishments where food was served.¹⁰⁹ If nothing else, Prohibition made it harder to operate the old-fashioned saloon. The state commissions also encouraged the issuance of licenses to grocery stores and other retail outlets that sold alcohol for home consumption.¹¹⁰ And states enacted laws making public drunkenness a crime in a variety of ways.¹¹¹ With the invention of the aluminum beer can and the spread of home refrigeration after the 1930s, even more factors promoted the home as the prime location for drinking.¹¹² In this way, licensing and regulation, plus marketing by distillers and brewers, increasingly pushed alcohol consumption into the home, where it was less likely to create a socially visible problem.¹¹³

Conclusion: The Lessons of Alcohol Prohibition for Drug Prohibition

Contrary to the commonplace libertarian argument that “you can’t legislate morality,” Prohibition demonstrates that it is possible to legislate personal conduct and to shape the

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Levine & Reinerman, *supra* note 33 at 56-57.

¹⁰⁹ *Id.*

¹¹⁰ Blocker, *supra* note 35 at 239.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

underlying moral choices, even if it is not possible to control those choices entirely. Attempts to “legislate morality” fail when they regulate the wrong thing or become confused about the purpose of regulation. Prohibition demonstrates that narrowly tailored regulations can work when they focus on imposing limits on how individuals exercise their moral choices, not whether those individuals may exercise those choices.

The movements for temperance and Prohibition demonstrate that regulating personal conduct and moral choices cannot be effective when it is a Trojan Horse for a broader, unstated social goal. Beginning in the mid-nineteenth century and continuing through the ratification of the Eighteenth Amendment (and even beyond), many advocates of regulating alcohol use were less concerned with regulating alcoholic beverages in themselves and more concerned with regulating certain economic or ethnic groups.¹¹⁴ This confusion of purposes led to the one of Prohibition’s primary problems: the disjunction between the professed objectives of Prohibition and its actual effects. Prohibition initially won support because it promised to control the behavior of other people, and it lost support and authoritativeness because it contradicted that promise by controlling the behavior of everyone. The regulation of personal conduct only works when the purposes and effects of that regulation are clear and consistent from the outset.

The regulation of personal conduct also cannot work on a large scale.¹¹⁵ To a great extent, the failure of Prohibition can be traced to the fact that “too many people used alcohol.”¹¹⁶ Prohibition’s attempt at regulation was too ambitious, both in terms of the severity of the restriction and the extensiveness of its application. As the experience of countries like Great Britain and Australia shows, and as the American history of post-Prohibition alcohol regulation

¹¹⁴ See Jefferson M. Fish, *Rethinking U.S. Drug Policy* in DRUGS & SOCIETY: U.S. PUBLIC POLICY 4 (Jefferson M. Fish, ed.) (2006).

¹¹⁵ See *id.* at 9.

¹¹⁶ *Id.*

demonstrates, regulation works when it is narrowly targeted and flexibly adaptable, especially regarding local conditions. As one commentator put it:

The end of Prohibition did not lead to a single, uniform legalization of alcohol. Rather, state and local governments became the laboratories of policy experimentation envisioned by the Constitution – and some areas of the country remain dry to this day. Similarly, one likely scenario for the end of drug prohibition – ending the federal government’s oppressive role – would encourage a diversity of approaches, implementing different mixes of public health and libertarian rationales, as different parts of the country attempt to develop the forms of legalization (or continued restrictions) that suit them best.¹¹⁷

Finally, the legal regulation of personal conduct works best when it aims to control how, when, and where the conduct is undertaken, not whether the conduct should occur. The regulations that worked in controlling alcohol use sought to discourage excessive consumption in all places and especially in public and to make drinking a private activity conducted within the home. The regulations that did not work were those that sought to entirely prohibit the production and distribution of alcohol or to convince or compel individuals from wanting to use alcohol.

With these lessons in mind, it is possible to outline a program of reform of regulating “controlled substances,” such as marijuana, cocaine, and heroin, among others. For the last few decades, these substances have been treated like alcohol was in the period between 1920-1933. The production, importation, and possession of these drugs has been explicitly banned, and the government has expended an enormous amount of resources to strenuously enforce that ban, imprisoning thousands of users and others, criminalizing an entire sector of economic activity. But drug use goes on, seemingly unabated. Instead of undertaking the futile effort to choke off the supply and demand of such drugs, government action would be far more effective, from both a law enforcement and public health perspective, if using those drugs was regulated to make that

¹¹⁷ *Id.* at 4.

use safe, for both the users and for the rest of society. Such regulation of use would not be the same everywhere; there cannot be a single, nationwide standard. But when this regulation is flexible, adaptable, and local, it promises to provide the best opportunity to reduce the dangers of drug use.